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IN THE

Supreme Court of the United States

No. 74-1068

UNITED STATES OF AMERICA ex rel.
JOHN B. ADAMS

Respondent.

VS.

PETER BENSINGER, et al.

Petitioners,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
TABLE OF CASES	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
A. In its handling of the issue the Court of Appeals nullified the deliberate by-pass doctrine formulated by this Court.	9
1. In *Henry* v. *Mississippi*, this Court established the deliberate by-pass doctrine in state prisoners Habeas Corpus petitions	9
2. The respondent deliberately by-passed the issue of voluntariness of his confession in the Illinois State Courts	9
B. By its holding below the Court of Appeals for the Seventh Circuit created a conflict between itself and the Court of Appeals for the Second Circuit	11
CONCLUSION	14

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit is reported at 507 Fed 2d 390 (1974) and is attached hereto as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, adverse to the People of the State of Illinois, was issued on December 10, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the respondent deliberately by-passed the issue of the voluntariness of his confession in the Illinois State Courts.

2. Whether the holding of the Court of Appeals for the Seventh Circuit below conflicts with the holding of the Court of Appeals for the Second Circuit.

TABLE OF AUTHORITIES

CASES:

Herry v. *Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965);

U.S. ex rel. Schadel v. *Follette*, 447 F. 2d 297 (2nd Cir. 1971);

US. ex rel. Hall v. *Keegan*, 298 F. Supp. 975 (S.D. N.Y. 1969).

REASONS FOR GRANTING THE WRIT

A. In its handling of the issue the Court of Appeals nullified the deliberate by-pass doctrine formulated by this Court.

B. By its holding below, the Court of Appeals created a conflict between itself and the Second Circuit Court of Appeals.

STATEMENT OF THE CASE

The respondent was convicted along with two co-defendants on the murder of John Fatigato, a shoe store operator, on December 22, 1962. The operator of an adjoining store, Jerry Johnson, testified that on December 22, 1962, while defendant Adams and his two co-defendants, Henderson and Mitchell, were present in his store, he heard them engage in conversation concerning how they were going to obtain money from the shoe store operator. Respondent Adams, as well as his co-defendants each made a statement admitting his part in the crime. They also joined in a statement which encompassed the individual statements. The statements established that Henderson and Mitchell initially entered the store and inquired about a pair of shoes. Henderson grabbed Fatigato. Mitchell then locked the front door of the store and both men carried Fatigato to the rear of the store and threw him on a bed. Henderson struck Fatigato on the head with his fist twice and then tied his mouth with a gag. Mitchell went next door and returned with the respondent John Adams. The respondent helped hold Fatigato down as Mitchell tied his hands and legs with telephone wire from the store phone. The men then ransacked Fatigato's living quarters and the store taking money and other items before exiting. Eugene Tapia, Cook County Coroner's pathologist who had examined Fatigato's body, testified that in his judgment the cause of death was trauma to the head, associated with asphyxia.

Prior to trial in the Circuit Court of Cook County, Indictment No. 63-170, respondent moved to suppress his confession to the crime, alleging that the confession was

inadmissible on three separate grounds: 1) alleged illegal detention; 2) deprivation of counsel; and 3) alleged promises of immunity. (TR. 2-6, 279). After a full and complete hearing on the motion, affording respondent a full and complete opportunity to evidence his claims, the trial judge denied the motion on all three grounds. After a trial by jury, the Honorable George Fiedler sentenced petitioner to a term of not less than thirty-five nor more than seventy years in the Illinois State Penitentiary.

On direct appeal to the Illinois Supreme Court, respondent argued that the failure to give *Miranda* warnings rendered respondent's confession involuntary. The Illinois Supreme Court affirmed respondent's conviction holding that *Miranda* and *Escobedo* were inapplicable.

Respondent then sought relief by way of habeas corpus in the United States District Court, again alleging involuntariness of his confession. Respondent relied solely upon the state court record, but as opposed to the grounds asserted in both the trial court and the Illinois Supreme Court, petitioner contended in the District Court (for the first time) that the "totality of the circumstances" surrounding his confession established involuntariness. The District Court dismissed respondent's petition for failure to exhaust state remedies. On appeal of the dismissal, the Seventh Circuit Court of Appeals remanded to the District Court for a determination as to whether or not the "totality" grounds had been presented to and decided on the merits by the Illinois Supreme Court (No. 16796, Sept. 1968). The District Court found that *these* grounds had not been considered and ruled upon by the Illinois Supreme Court, and dismissed the petition suggesting that respondent pursue available state post conviction remedies. Respondent then petitioned the Circuit Court of Cook

County for relief under the Illinois Post Conviction Hearing Act, alleging that the "totality" established involuntariness of his confession. After an evidentiary hearing Honorable George Fiedler dismissed the petition holding that the issue of the voluntariness of respondent's confession had already been denied by the Illinois Supreme Court on direct appeal, and that respondent was barred from now asserting *new* grounds that could have been asserted on direct appeal. On appeal of this dismissal the Illinois Supreme Court affirmed the dismissal. (*People* v. *Adams*, 52 Ill. 2d 224 (1972) holding:

> "On this appeal the petitioner now argues that the involuntariness of his confession is established by the totality of the circumstances surrounding the giving of the statements. That argument is predicated upon the evidence presented in the hearing on the post-conviction petition in the form of testimony of a behavioral scientist and that of a clinical psychologist who examined the petitioner in 1964 when he was admitted to the State penitentiary. They testified that petitioner had an I.Q. of 56 to 62, was illiterate and in their opinion possessed limited mental capacity. Significantly, however, at the original pretrial motion to suppress his confession and at trial it was repeatedly noted that petitioner could not read or write and had only a second grade education. No suggestion is made that evidence similar to that presented at the post-conviction hearing was not available at trial.
>
> This post-conviction proceeding, in essence, seeks to relitigate the same issue on the basis of evidence, all or much of which could have been presented at the trial and which does not necessarily require a different result . . . It is our opinion that the application of the doctrine of *res judicata* should not be relaxed . . ."

Respondent then petitioned the District Court for habeas relief, alleging, on the basis of the trial record and evidence produced at the post conviction hearing, that the totality of circumstances surrounding his confession established involuntariness. The Honorable Richard B. Austin, District Court Judge, dismissed the petition, holding in a memorandum opinion that:

> ". . . throughout the trial, Adams denied ever making the confession that was admitted into evidence against him. Since he was represented by counsel, it was reasonable to assume that as a matter of trial strategy the defense preferred to rely on this denial rather than attempt to convince the trial and appellate courts that the confession was involuntary. Furthermore, a hearing was held prior to trial on a motion to suppress the confession, but the question of involuntariness was by-passed even though it appears that evidence to support that claim was then available. Hence, the issue of voluntariness is not properly before this court on a petition for habeas corpus."

Judge Austin went on to hold that:

> ". . . even if the issue of voluntariness was now properly before this court, I am of the opinion that Adams possesses the requisite mental capacity to make a voluntary confession, despite the opinion of a behavioral scientist and clinical psychologist, neither of whom are medical doctors . . . [F]or a person who is now supposedly mentally defective, his answers to questions were always responsive and lucid . . . [E]ven when he was subjected to a grueling cross-examination by the prosecution at the time he denied ever making the confession at all."

The respondent then appealed from the judgment of the District Court, to the U.S. Court of Appeals for the

Seventh Circuit. And on December 10, 1974, that Court unanimously reversed the District Court and ordered that the "writ (of habeas corpus) issue unless the petitioner is given a new trial within 120 days of the date of the mandate of this Court." On January 22, 1975 the Seventh Circuit ordered that their mandate be stayed on the condition that the respondents-appellees petition the U.S. Supreme Court for a Writ of Certiorari on or before Feb. 21, 1975.

REASONS FOR GRANTING THE WRIT

A.

IN ITS HANDLING OF THE ISSUE THE COURT OF APPEALS NULLIFIED THE "DELIBERATE BY-PASS" DOCTRINE FORMULATED BY THIS COURT.

1.

In Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564 (1965), This Court Established The Deliberate By-Pass Doctrine In State Prisoner's Habeas Corpus Petitions.

In *Henry*, this Court held that a ". . . deliberate choice of . . . strategy would amount to a waiver binding on petioner and would preclude him from a decision on the merits of his federal case either in the state courts or here" This case presents just such a deliberate strategy by the respondent.

2.

The Respondent Deliberately By-Passed The Involuntariness Of His Confession As An Issue In The Illinois State Courts.

The all important fact in this appeal is that at *no point* during either the pre-trial motion to suppress or the trial itself, did the respondent even *remotely* suggest the voluntariness of his confession as an issue before the trial court. The trial record is absolutely and unequivocally clear on this point. (See Appendix C; A. 14, 15, 16, 17, 111, 112, 113, 114)

At the pretrial suppression hearing the respondent merely recounted his arrest and questions in a straightforward, chronological manner (A. 14, 15, 16, 17). But

further, and most importantly he laid the ground work for what, at trial, would become an alibi defense (A. 15). The thrust of all respondent's pretrial testimony was threefold; (1) alleged illegal detention; (2) deprivation of proper control; (3) alleged promises of immunity. At no time did the respondent even vaguely hint that his confession was involuntary.

When confronted with his confession at trial, the respondent categorically denied each and every material statement contained therein, even going so far as to deny the presence of a court reporter (A. 111, 112). The respondent further gave an accounting of his whereabouts on the night of the offense, which placed him away from the scene of the crime and thereby raised an alibi defense. Through his various appellate maneuvers the respondent has acted to transform what at trial were questions of fact for the jury's determination, into questions of law. Thus in reaching its verdict, the jury weighed matters of credibility which included the respondent's denial of his confession. On appeal, however, the respondent has sought to raise the circumstances of his confession as a matter of law.

Respondent's testimony during the pretrial supplementary hearing and actual trial was consistent with a deliberate strategy to by-pass the issue of voluntariness.

The record is clear that the respondent did not raise the voluntariness issue during the pretrial hearing, although that did not legally preclude the issue from being raised at trial. Simple logic however dictates that a credible defendant could not have simultaneously maintained that, (1) he never made a confession *and* (2) that even if he did, the confession was involuntary. Therefore, ra-

ther than relying on such an obvious contradiction the respondent deliberately chose another avenue of defense, the alibi. The deliberateness of rspondent's strategy is manifested by his steadfast denials of ever making a confession even, as Judge Austin pointed out in the District Court, under "grueling cross examination" (App. B.)

Thus, for the Court below to hold that "there was no tactical reason to avoid raising the contention of voluntariness in the state courts," is to defy common sense.

For the above stated reasons, the petitioner submits that the Court below incorrectly decided the threshold by-pass issue and therefore improperly proceeded to a determination of the ultimate issue of voluntariness.

B.

By Its Holding Below The Court Of Appeals Created A Conflict Between Itself And The Second Circuit Court Of Appeals.

In *United States ex rel. Cruz* v. *LaVallee*, 448 F. 2d 671 (2nd Cir., 1971), wherein petitioner, *as here*, failed to object to the voluntariness of his confession at the trial court and failed to request a charge to the jury on voluntariness, the Second Circuit Court of Appeals after reviewing the record in the case, found that the record reflected a deliberate and consistent trial strategy of the defense not to question the voluntariness of petitioner's confession. The court denied the petitioner even an evidentiary hearing, holding that petitioner's deliberate bypass waived any right to have his new claim heard in federal court. Significantly, in *Cruz*, as in the present case, the trial strategy was such that attacking the voluntariness of the confession would have presented inconsistencies that would have confused the jury and would

have "directed the jury's attention away from the factors which [petitioner] and his counsel clearly hoped would influence the jury to reject a murder conviction". (at 673) Furthermore, the *Cruz* court rejected petitioner's contention that his defense counsel's strategy could not be considered a waiver on his part since petitioner *himself* did not participate in that decision, stating the following:

> We reject this contention. The Supreme Court stated in Henry v. Mississippi that "the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have [the] effect" of precluding the defendant from later asserting constitutional claims, even where the trial strategy was adopted by counsel without prior consultation with the defendant. 379 U.S. at 451-452, 85 S. Ct. at 569. A lawyer must be able to determine questions of strategy during trial; and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right of effective assistance of counsel, his decision regarding trial strategy must be binding. See. *United States ex rel Schaedel* v. *Follette*, 947 F. 2d 1297 at p. 1300 (2nd Cir. 1971); *United States ex rel. Bruno* v. *Herold, supra*, 408 F. 2d at 128-129; *United States ex rel. Aaron* v. *Herold*, 426 F. 2d 125, 127 (2nd Cir. 1970); *Kuhl* v. *United States*, 370 F. 2d 20, 26-28 (9th Cir. 1966) (en banc.). There are no exceptional circumstances here. Cruz makes no claim of incompetence of counsel nor would such a claim be justified since the record of the trial indicates, and the district court found, that Cruz's distinguished trial counsel adopted a reasonable, well-thought-out, and well-presented strategy in light of the overwhelming evidence against the defendant.

In *United States ex rel. Schaedel* v. *Follette*, 447 F. 2d 297 (2nd Cir. 1971), petitioner *as here* had failed to object to an allegedly involuntary admission at the trial court, had not attempted to raise the issue on direct appeal, and had been held to have waived the objection in subsequent coram nobis proceedings. The Second Circuit Court of Appeals affirmed the dismissal of petitioner's habeas corpus petition, emphasizing the fact that petitioner not only failed to object at trial but failed to raise the issue on direct appeal as well. The court rejected petitioner's contention that he was not bound by his counsel's strategic choice:

> A strategic decision by appellant's counsel not to object to a confession, with or without prior consultation with the client, is binding on the client in the absence of exceptional circumstances. *Henry* v. *Mississippi*, *supra*; *United States ex rel. Aaron* v. *Herold*, 426 F. 2d 125 (2nd Cir. 1970). Counsel's position as manager of the lawsuit requires such a standard, and a contrary rule would unnecessarily disrupt the trial process. See J. Gibons, Waiver: The Quest for Functional Limitations on Habeas Corpus Jurisdiction, 2 Seton Hall L. Rev. 291, 304-305 (1971); Developments—Federal Habeas Corpus, 83, Harv. L. Rev. 1038, 1109-1112 (1970) . . . Absent a claim of incompetence of counsel, therefore, counsel's deliberate decisions not to object or raise the issue on appeal foreclosed federal habeas relief. *Cf. McMann* v. *Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *J. Gibbons*, *supra* at 305.

See also *United States ex rel. Hall* v. *Deegan*, 298 F. Supp. 975 (S.D. N.Y. 1969).

Therefore, it is clear, that the Seventh Circuit's holding in this case, is in direct conflict with cases cited above.

CONCLUSION

For the foregoing reasons the petitioner requests that a petition for a writ of certiorari be granted.

Respectfully submitted,

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